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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949.

No. 550

CHARLOTTE L. BLOCK, HAROLD BLOCK, MAX N. BLOCK, SYLVIA B. FISH, BERNARD SHULMAN, FRED H. WOLF, and LILLIAN WOLF,

Petitioners,

vs.

DETROIT HARBOR TERMINALS, INC., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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No.

CHARLOTTE L. BLOCK, HAROLD BLOCK, MAX N. BLOCK, SYLVIA B. FISH, BERNARD SHULMAN, FRED H. WOLF, and LILLIAN WOLF,

Petitioners,

vs.

DETROIT HARBOR TERMINALS, INC., a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the United States:

Petitioners, Charlotte L. Block, Harold Block, Max N. Block, Sylvia B. Fish, Bernard Shulman, Fred H. Wolf, and Lillian Wolf, respectfully petition this court for the issuance of a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review its judgment of December 9, 1949, affirming the orders below without an opinion, to the end that its judgment be reversed with directions to reverse the orders appealed from.

Summary Statement of the Matter Involved.

Petitioners are a group of registered stockholders holding in excess of 2% of the capital stock of Respondent, a Michigan corporation. Section 35 of the Michigan Corporation Act provides that at least ten days prior to an annual meeting there shall be made available to any stockholder holding in the aggregate 2% of the capital stock, the list of the names and addresses of the stockholders. They received notice dated February 12, 1949, that the annual meeting would be held at Detroit on February 23, 1949, at 11:00 A. M. to elect directors and for other business that may come up before the meeting. Petitioners made a demand on the Respondent dated February 14, 1949, for the names and addresses of the stockholders in order to solicit opposition proxies for a slate of directors other than proposed by the management and when the demand was refused they instituted suit on February 19, 1949, to restrain the election until the defendant would comply with the Statute, and immediately served notice for a temporary restraining order to be heard on February 23, 1949, prior to the meeting, and in support thereof they relied on the verified complaint.

Respondent presented its sworn answer, on information and belief, and urged at the hearing that its answer be considered as "evidence" in opposition to the motion for the restraining order. The district court treated the answer as evidence, over the objections of petitioners, denied the motion for the restraining order, and directed the parties to appear in the afternoon for the entry of a draft order. Meanwhile, the election was held, over the objections of petitioners, and thereafter the parties returned in court for the entry of the order at which time

petitioners presented an ammendment to the complaint alleging: (1) that a single bondholder who had the required 2% also made a demand for the list of the stockholders which was likewise refused, and (2) the supplemental matters which occurred at the meeting. The court refused to hear the motion for leave to file the amendment on the ground that no notice was served on the motion, notwithstanding the fact that the attorneys for the defendant were present in court. An appeal was taken from the denial of the restraining order. Thereafter due notice was given on the motion for leave to file the amendment and also to overrule several of the defenses, the motion to dismiss, and to strike certain parts of the answer. The court heard the matter on written briefs and oral argument but refused to rule on any of the legal issues until the trial of the case, and denied the right to file the amendment as to (1) but permitted the filing of the amendment as to (2).

Subsequent to the perfection of the appeal, the court filed "Findings of facts and Conclusions of law". After the denial of the right to amend and refusal to pass on the legal issues which were argued before it, a second appeal was taken which was consolidated with the first appeal. On December 9, 1949, the Court of Appeals affirmed all orders without an opinion.

One of the main questions which was involved was whether under the Michigan code 2% of the stock was required to be owned by a single stockholder or it might have been owned by a group of stockholders. This was the only point that was urged in opposition to the motion for the restraining order and was the only basis upon which the restraining order was denied. However, in the "Finding of Facts", which the court filed subsequent

to the perfection of the appeal, it stated that it did not rule on that question. A ruling on the point that the 2% was required to be owned by a single stockholder would have ended the case as none of the Petitioners was such an owner. Petitioners, therefore, urged under Rule 12 (d) of the Rules for Federal Procedure for a ruling on this legal issue when they moved to overrule the several defenses and the motion to dismiss, which the court refused to determine. The demand for the right to amend was for the purpose of showing that a single stockholder who owned the required 2% also made a demand and his demand was also refused, but the court denied the right to file such amendment. The Court of Appeals sustained all of the orders by the mere statement that it could not see that any error was committed.

The Questions Involved.

1. The effect of Rules 8(d), 11 and 12(d) of the Federal Rules of Civil Procedure on the right of a court to consider as true an answer to a complaint on information and belief, in opposition to a motion for a restraining order to maintain the *status quo* based on the allegations contained in a verified complaint, and whether the denial of the motion based on such answer and the holding of the election which defeated the entire cause of action, may be justified by a Court of Appeals without even giving its reasons for the affirmance of the order appealed from.

2. Whether a court may arbitrarily refuse to pass on legal questions raised by a motion pursuant to Rule 12(d) after hearing oral argument and submission of written briefs and compel the parties to await the disposition of the legal issues until trial, when a disposition of the legal issues would avoid a trial.

3. Whether an order denying leave to file an amendment to a complaint pursuant to Rule 15 for the purpose of curing an alleged defect may be sustained by a Court of Appeals without even giving a reason for the propriety of the order.

4. Whether a court may make findings of facts and conclusions of law after the perfection of an appeal and whether such findings may be sustained when there is no basis in the record to support them, even if it be proper practice to file them after the perfection of the appeal.

5. Whether the motives of petitioners, who proceeded under the mandatory provision of the Statute which provided that the list be made available to them at least ten days before the annual meeting, may be challenged and whether there is basis for the finding that petitioners' motives were improper, and whether it was proper for the Court of Appeals to sustain the order based on such findings.

Reasons for the Allowance of the Writ.

I.

The orders of the District Court which were affirmed by the Court of Appeals without an opinion raises a doubt as to the meaning and usefulness of Rules 8(d) and 11 and 12(d) of the Federal Rules of Civil Procedure. The affirmance of the orders by the Court of Appeals for the Sixth Circuit is in conflict with the spirit of the rules as construed by other courts. The writ should be issued to harmonize the decisions and to settle important questions of procedure under the Federal Rules.

II.

The petition involves the construction of Rule 12(d) which according to the trial court as affirmed by the Court of Appeals authorizes a court after hearing argument to decline a determination of the legal questions and compels the parties to litigate on facts which might not be necessary if the court had ruled on the legal questions. The discretion under such circumstances should not be an arbitrary one and the rule should be so construed, and the writ should be issued in order to obtain a proper construction of the rule.

III.

The affirmance of the order denying the right to file a first amendment prior to trial pursuant to Rule 15 for the purpose of curing a defect in the allegations is not in conformity with the liberal interpretation of that rule as construed by other courts.

IV.

A Court of Appeals should be required to at least state reasons for the affirmance of the orders appealed from so that litigants may not be kept in the dark and Petitioners were entitled to a ruling on the specified errors which were presented to it and which were as follows:

(1) The court erred in refusing to grant the temporary restraining order:

(a) In considering the sworn answer of the defendant as evidence;

(b) In basing its findings on statements of counsel which were not supported by any proof;

(c) In finding that no irreparable damage will be incurred by the plaintiffs if the restraining order will not be issued;

(d) In finding that the motives of the plaintiffs were improper which finding has no support in the record;

(e) In finding that the action taken in the past by the board of directors was reasonable, without any proof in support of the findings:

(f) In denying the relief on the ground that plaintiffs were guilty of laches;

(g) In holding that the interest of the stockholders would best be served by the denial of the restraining order;

(h) In determining that an individual stockholder was required to own 2% of the stock and that the stock could not be aggregated for the purpose of having the required amount and later filing its conclusions wherein it stated that it made no determination of the issue.

(2) The court abused its discretion in refusing to grant the temporary restraining order, and in refusing to allow the amendment to the complaint, and in refusing to grant plaintiffs' motion to overrule the motion to dismiss and to strike the several defenses.

(3) The filing of the findings of facts and conclusions of law involving the subject matter of the order appealed from subsequent to the perfection of the appeal was without jurisdiction.

(4) The findings are not supported by any proof, and the conclusions of law are contrary to the elementary principles of law.

Prayer for Relief.

Petitioners, therefore, pray that this court may exercise its discretion to grant a writ of certiorari to review the judgment of December 9, 1949 of the United States Court of Appeals for the Sixth Circuit to the end that the judgment be reversed with directions to reverse the orders appealed from, and for such other orders as it may deem proper.

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No.

CHARLOTTE L. BLOCK, HAROLD BLOCK, MAX N. BLOCK, SYLVIA B. FISH, BERNARD SHULMAN, FRED H. WOLF, and LILLIAN WOLF,

Petitioners,

vs.

DETROIT HARBOR TERMINALS, INC., a corporation,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The jurisdiction of this court is invoked under §1254 of the Judiciary Act of 1948 (T. 28, §1254, U. S. C. A.). The judgment of the Court of Appeals was rendered December 9, 1949 and its mandate was stayed pending application and disposition of the Petition.

Opinion Below.

The Court of Appeals did not render any opinion but stated in its order of December 9, 1949 that there was no reversible error in the record and it, therefore, affirmed the order, (R. 173).

A Statement of the Case.

This was an action by a group of stockholders of the Detroit Harbor Terminals, Inc., seeking to restrain the corporation from holding an annual meeting for the election of directors until it made available to the plaintiffs the names and addresses of the stockholders which it had refused to make available to plaintiffs before the action for the purpose of soliciting oppositions proxies for the election of a different slate of directors. The court refused to issue a temporary restraining order to maintain the status quo and later denied leave to amend the complaint and refused to rule on the motion to overrule certain defenses and the motion to dismiss. Appeals were prosecuted from all interlocutory orders including the findings of facts and conclusions of law which were made and filed after the removal of the case by appeal from the refusal to issue the restraining order.

The complaint was filed February 19, 1949 (R. 3) and alleged: (1) that plaintiffs were registered stockholders having in excess of 2% of the outstanding stock and were residents and citizens of Illinois and the defendant was a resident and citizen of Ohio, and that their claim exceeded $3,000 exclusive of interest and costs; (2) that they received a notice for the annual meeting dated February 12, 1949; (3) on February 14, 1949 they made a written demand on the defendant and its officers to make the names and addresses available to them for the purpose of soliciting opposition proxies for the election of directors at the annual meeting of the corporation which was to be held February 23, 1949 (R. 3-4) which demand was refused; (4) that the refusal was (R. 5) in violation of §35 of the Michigan Corporation

Code;* (5) that the refusal was pursuant to the established policy of the defendant to deny to stockholders the right to inspect the names and addresses although requests by other stockholders having more than the required 2% were previously made.

It was further alleged: (6) that the corporation had large funds in its possession which it failed to distribute in dividends, giving the details as to the funds (R. 5); (7) that plaintiffs stated in their demand that they were desirous to communicate with their fellow stockholders for the purpose of urging them to vote for a slate of directors who would distribute larger dividends; (8) that out of net earnings in 1947 of $148,925.24 only $13,008.20 was paid in dividends and out of net earnings in 1948 of $142,197.25 only $20,029.20 was paid in dividends; (9) that plaintiffs were prevented from obtaining proxies for the election of directors who would vote for larger dividends by the refusal of the defendant to make the names available to them; (10) that plaintiffs own 1377 shares out of 66,764 which is in excess of 2% of the total shares outstanding; (11) that by reason of the failure to comply with the statutory requirement the defendant should not be allowed to use the proxies which were obtained for the election of the directors sponsored by the management; (12) that the defendant should be restrained from proceeding with the election until the plaintiffs will be afforded the opportunity to communicate with the stockholders (R. 6-7).

* Section 35 of the Michigan Corporation Code provides * * * Such list shall be open at the place where said election is to be held for at least ten days before such election, for examination by any registered shareholder entitled to vote at such election and holding in the aggregate at least two per cent of the outstanding capital stock of the corporation, and shall be produced and kept at the time and place of election during the whole time thereof, and shall be subject to the inspection of any registered shareholder or his proxy who may be present. Upon the wilful neglect or refusal of the directors then in office to produce or cause to be produced such a list at any election they shall be ineligible to any office at such election * * *.

The complaint prayed for the issuance of a temporary restraining order to maintain the status quo, and for a final determination that the defendant violated the statutory provision; that the directors who joined in the refusal were ineligible to office, and to direct the defendant to make the names and addresses of the stockholders available to the plaintiffs pursuant to section 35 of the Michigan Corporation Code (R. 7-8).

Service on the defendant was obtained on February 21, 1949 when it was also served with notice that plaintiffs would appear in court on February 23, 1949, prior to the meeting, and ask for the issuance of a temporary injunction for the purpose of maintaining the status quo as prayed in the verified complaint (R. 8). Defendant presented at the hearing (R. 54) a pleading entitled "Motion to Dismiss" and "Answer" (R. 10) and urged that the "sworn answer" constituted "Evidence" (R. 59, 63, 64, 74) to which plaintiffs objected (R. 71) on the ground that under rules 8(d) and 11 (R. 73) the answer cannot be considered as evidence, and that they were entitled to a trial on the factual issues (R. 78). They also urged that the "motion to dismiss" and the several defenses were not well founded in point of law (R. 76-82) and that they were entitled to the temporary restraining order to maintain the status quo (R. 83).

The main question which was considered by the court at the hearing was whether the statutory requirement for a demand by "any stockholder" having in the "aggregate" 2% of the stock was intended to require the individual stockholder to be the owner of the 2%, or whether plaintiffs as a group had the right to aggregate their stock for the 2% requirement (R. 55-57, 61-62, 87-88). It appears from the record that the refusal to

grant the restraining order was based on this point (R. 88). However, subsequent to the entry of the order refusing to grant the temporary relief and after the perfection of the appeal (R. 50) the court made "findings of fact" and "conclusions of law" (R. 113) wherein it stated that the refusal to grant the restraining order was not based on this point which it had not determined (R. 115).

In the afternoon of the same day, and subsequent to the meeting, when the parties appeared for the entry of the draft order, plaintiffs moved (R. 89) for leave to file an amendment to the complaint by: (1) supplying the names and number of shares of individuals who had the required 2% and who made a similar demand, whose demand was refused (R. 81-90; ¶ 1) and (2) to supply facts which occurred at the meeting (R. 91; ¶ 2). On March 24, 1949 the court denied leave to amend as to the first part, and granted leave to amend as to the supplemental matters.

Plaintiffs also moved, pursuant to rule 12(d) to dispose of the motion to dismiss and the several defenses which were unsound in point of law, prior to trial. By its order of March 24, 1949 the court refused to rule on the motion and postponed its determination thereof until a final hearing of the case, although it heard the matter on written briefs and oral argument.

An appeal was also taken from the last order which was consolidated with the first appeal, and all orders were affirmed by the Court of Appeals on December 9, 1949 without an opinion.

ARGUMENT.

I.

The affirmance of the denial of the restraining order on the ground that the election would not prejudice the rights of petitioners who sought in their complaint the primary relief to prevent the election, based on an answer which was verified on information and belief, was in violation of Rules 8(d) and 11 of the Federal Rules of Civil Procedure and in conflict with the construction of the rules by other courts of appeal.

The main relief which petitioners sought in their complaint was *to prevent the election of the directors* named by the "management" and to solicit opposition proxies for another slate. When the court denied the restraining order and *permitted the election* to be held *it thereby prejudiced* petitioners rights, as it *defeated the primary relief*. The court stated in its finding (R. 114; ¶ 2) "that no irreparable damage will be incurred by the plaintiffs if the requested temporary restraining order is denied", and this was affirmed by the Court of Appeals. This is in direct *conflict* with the decision of the 8th Circuit in *Higginson* v. *C. & B. & Q. R. Co.*, 102 F. 197, 199 cited in *Interstate Transit* v. *City of Detroit*, 46 F. (2nd) 42. There it was said (p. 43):

> "We do not consider it to have been necessary for the court below, upon a hearing of the motion for temporary injunction, to have decided the ultimate question of the right of the plaintiff to a permanent injunction, but *only whether the bill stated a cause of action and whether, unless the existing status be preserved, the plaintiff would be deprived of the*

right of contesting the questions presented and thus suffer an irreparable injury. This is a question which we may consider upon appeal (*Higginson* v. *Chicago, B. & Q. R. Co.*, 102 F. 197, 199, (C.C.A. 8)), and, just as where the temporary injunction has been granted it will not be disturbed if it simply preserves the existing state of things 'until the rights of the parties can be safely and fully investigated and determined upon strictly legal proofs according to the course and principles of equity' (*Maison Dorin Societe Anonyme* v. *Arnold*, 296 F. 387, 390, (C.C.A. 2)) so here *the policy and purpose of the courts should be toward the protection and preservation of all possible rights of the parties*".

The court concluded (p. 44):

"Under such circumstances *we think the court below acted upon a mistaken view of the applicable law and that the temporary injunction should have been granted.* The interlocutory order of the court below, refusing temporary injunction, is reversed, and the cause is remanded with instructions to grant the temporary injunction and hear the case upon the merits." (Emphasis ours.)

In *Wheeling & L. E. Ry. Co.* v. *Pittsburgh & W. V. Ry. Co.*, 33 F. (2d) 390, the court said (p. 393):

"We recognize that, when the issue of a preliminary injunction rests upon the discretion of the trial judge, his exercise thereof will not usually be reviewed; but this familiar rule has no application where it is fairly apparent, as it is here, that he was chiefly moved by a view of the law with which the appellate court is unable to agree. Whether this agreement shows an abandonment within the meaning of the statute is a legal question. *Louisville & N. R. Co.* v. *Western Union Tel. Co.*, (C.C.A. 6) 207 F. 1, 4, 5."

In *Menominee & Marinette L. & T. Co.* v. *City of Menominee*, 11 F. Supp. 989, the court said (p. 991):

> "The likelihood of injury to defendants if temporary injunction issues would appear to be comparatively trivial provided protection is afforded by an adequate bond for payment of costs and damage in event an injunction shall ultimately appear to have been ill-founded. On the other hand, injury to plaintiff occasioned by denial of temporary injunction would be serious if not irreparable should final hearing disclose plaintiff to be entitled to such injunctive relief. Upon measuring the damage of refusal of preliminary injunction to plaintiff against the injury to defendants if temporary injunction is issued under adequate bond, the court believes the injunction should issue. It therefore seems equitable to preserve the status quo of the parties, at the same time affording to defendants the protection of a bond."

No evidence was offered in support of the allegations contained in the answer. Rule 8 (d) provides:

> "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

Rule 11 provides, among other things:

> "The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished."

The refusal to grant the restraining order in the instant case was based on a clearly mistaken view of the law, and in disregard of Rules 8(d) and 11.

(a) The court based its order on the sworn answer which it considered as evidence contrary to rules 8 (d) and 11 of the Federal Rules of Civil Procedure.

In the *belated* "findings of facts" the court stated (R. 113) that after consideration of the complaint and "the sworn answer" it made its findings of facts. The order denying the restraining order (R. 50) stated that it was on "the sworn answer of the defendant." At the hearing on the motion defendant urged that the court should consider its answer as evidence (R. 64-65, 67, 69). Plaintiffs urged (R. 71) that "under the Federal practice an answer that is filed by a defendant is not admitted to be true," and that the matter comes up upon the verified complaint, and that the plaintiffs are entitled to a trial on the facts. The attention of the court was called to rule 8 (d) which provides that an averment in a pleading to which no responsive pleading is required "shall be taken as denied or avoided", without a reply. It was pointed out to the court (R. 76) that the only question before it was whether the complaint stated a cause of action entitling the plaintiffs to a temporary restraining order and that all other issues which are raised by the answer are to be determined upon a hearing and *that the defendant must support its allegations by proof* (R. 71, 73, 74, 76). After the denial of the motion and when the parties appeared in court in the afternoon for the purpose of entering the draft order, this issue was again presented to the court (R. 92, 93) and the court signed the order presented by the counsel for the defendant which stated that it was *made upon the allegations contained in the sworn answer.* The statements contained in the sworn answer were, therefore, *clearly erroneously considered by the court as "evidence"* in violation of rules 8 (d) and 11 (*Hugh's Federal*

Practice vol. 17 page 424; *Moore's Fed. Practice* vol. 2, page 2107.

(1) The Sworn Answer on information and belief was improperly considered as true.

While upon a motion for an interlocutory injunction the court may treat "a verified complaint as equivalent to an affidavit", an answer verified "*on information and belief*" *is insufficient.* Here, the answer was verified by the vice president and general manager who stated (R. 17) "that the matters set forth in said answer are true of his own knowledge, *except as to the matters stated to be upon information and belief,* and as to those matters he believes it to be true." Having failed to state which allegations were of "his own knowledge" and which allegations were "on information and belief" *the verification was fatal,* and the answer *had no probative value.* (*Christian Hospital* v. *The People,* 223 Ill. 244, 249; *Grabarski* v. *Stankowicz,* 179 Ill. App. 45, 47; *Lake Shore & M. S. Ry. Co.* v. *Felton,* 103 Fed. 162, 230; *Garlack-Barklaw Co.* v. *Morris and Benian,* 23 Fed. (2) 159, 162).

(2) The findings of facts are founded on the statements contained in the sworn answer which the court mistakenly considered as evidence.

The court found that the motive of the plaintiffs was improper, saying (R. 114):

> "That the motives of the plaintiffs in bringing this action challenged by the defendant do not warrant the granting of the requested temporary restraining order."

This finding is based on the second defense in the answer (R. 10) wherein the defendant said that plaintiffs "are not actuated by motives that are lawful and proper."*

* Plaintiffs moved to strike the defense (R. 112).

No proof was offered to sustain this allegation, *and there is no basis in the record for this finding.*

The finding (R. 114) that no demand was made by any stockholder holding 2% of the corporation stock and that the plaintiffs had not satisfied the court that a demand was made by a combination of stockholders holding 2% of the stock, *was based on the denial in the answer* (R. 12) which the court *improperly considered as true,* without evidence in support thereof.

The finding (R. 114) that the action taken by the board of directors in the past on the declaration of dividends has been reasonable is also based on the answer which is not supported by any proof. It is evident, therefore, that the order was based on the *mistaken view of applicable law.* The affirmance of such views by the Court of Appeals deserves the issuance of the writ.

(b) The findings are based on a clear misconception of applicable law.

We have already shown that the finding of the court that plaintiffs' motive was improper is not supported by any proof. However, *the entire question was improperly considered* by the court under the mistaken view that it had the right to inquire into plaintiffs' motive. It completely overlooked that where a statutory right is given requiring *no purpose for a demand, the motive* may *not* even be considered (13 *Am. Jur. Corp.* §442).* It is clear that *the defendant had no right to question the motive of the plaintiffs* upon a statutory remedy which was *mandatory* (*Venner* v. *Chicago City Ry. Co., supra,* 246 Ill. 170, 173; *Hohman* v. *Illinois, Iowa Power Co.,*

* For this reason it was the duty of the court to sustain the motion to strike the defense (R. 112) which it refused.

305 Ill. App. 17; *Doggett* v. *North American Life Ins. Co.*, 328 Ill. App. 613, 621, *affirmed on this point in* 396 Ill. 354, 369). Besides, there being no evidence in the record to support the allegation that plaintiffs' motive was improper *it was the duty of the court to presume that the motives were proper* (*Slay* v. *Polonia Pub. Co.*, 249 Mich. 609, 612).

The finding (R. 114) that the action taken by the board of directors in the past on the declaration of dividends has been "reasonable", *has no support in the record,* particularly in view of the allegations in the verified complaint (R. 6) that the demand was made for the purpose of communicating with the stockholders to ascertain their views on the question whether larger dividends should be paid and on the election of directors who will vote for larger dividends. Whether or not the acts of the directors in the past as to the distribution of dividends was "reasonable" *was a question which the stockholders had a right to determine for themselves,* and the court had no right *to substitute its judgment for the judgment of the stockholders.* This finding was evidently based on the answer which alleged (R. 15) that the funds were needed for improvements and to loan money to customers. Not only did the court err in considering the statement in the answer as "evidence", but its conclusion was *fallacious* as the complaint did not seek for a distribution of dividends and only sought to enable the plaintiffs to communicate with the stockholders so that *they might determine whether or not larger dividends should have been declared* and vote for directors who would declare larger dividends. *It was for them and not for the court* to determine whether distribution of $20,028.20 from *net* earnings of $142,197.25 in 1947, or $13,008.20 out of *net* earnings of $148,925.94 in 1948 was reasonable.

The findings of the court which are based on a mistaken view of the law and without support in the record warranted a reversal of the orders according to the view expressed in *Special Service Co.* v. *Delaney,* 172 F. (2) 16, where the court said (p. 19):

> "It is *necessary when there is such misapprehension* of the evidence and when the *decision is so clearly erroneous,* that is, *against the truth and right of the case,* that this court give effect to its *own conclusions.*"

See also *Standline and Co.* v. *Sellers,* 174 F. (2) 948, 956.

(c) It affirmatively appears from the record that the affidavit was false.

The answer stated (R. 15-16) as a "fact" that the demand was not made by a combined list of stockholders holding two per cent of the stock and that Wolf only owned 570 shares and the other plaintiffs only owned 307 shares. The court adopted this as "true" in its findings (R. 114; ¶ 7). We filed in the Court of Appeals the photostatic copies of the stock and of the demand and refusal (R. 165-171) which showed the *falsity* of the statement in the Sworn Answer.

II.

The refusal to grant the temporary injunction was based on a clear misconception of law and on findings which are not supported by the record.

The court found in its second finding (R. 114):

> "that no irreparable damage would be incurred by the plaintiffs if the requested temporary restraining order is denied".

The finding is clearly without foundation.

(a) The refusal to maintain the status quo prejudiced the right of the petitioners.

The object of the suit was to prevent the election of the members of the board who were ineligible to office because of their refusal to comply with §35 of the statute. *The restraining order was sought to maintain the status quo.* How a failure to grant the motion, which operated to enable the election of the directors and defeat the main purpose of the complaint, would not cause irreparable damage to the plaintiffs, is difficult to understand as the demand for the list was made in order to obtain proxies for the *election of a different slate of directors,* and the suit was filed to obtain such relief.

The court found (R. 114) that the action taken by the board of directors in the past has been "reasonable" and that the "motive" of the plaintiffs in seeking the list and in bringing the action was *improper.* This finding was made in the face of the record (R. 35) that the corporation earned $193,775.12 *net* in the year 1945, and *not one cent was paid in dividends.* For the year 1946 it earned (R. 39) $163,914.87 *net,* and *not one cent* was paid in dividends. Out of a *net* earning in 1947 of $148,925.94 it *only* distributed in dividends $13,008.35 (R. 44), and out of *net* earnings of $142,197.25 in 1948 it *only* paid $20,029.20 in dividends. There is no basis, therefore, for the determination by the court that the distribution of the dividends in the past was reasonable.

The Sixth finding (R. 114) that the best interests of the stockholders would be served if the meeting would be held without interference by the court and the Seventh Finding that no demand was made, are based *on matters which are not supported by any proof and are contrary to the allegations contained in the verified complaint.*

(b) The denial of the restraining order on the ground of alleged laches is palpably erroneous.

The court found in its fifth finding (R. 114):

> "The plaintiffs long knew the approximate date of the annual meeting and made no request for a list of stockholders until several days before the date fixed for such meeting."

This finding was based on the almost identical language contained in the second defense (R. 10). This defense was based on what "appears from the record in this cause." The only thing that appears from the record in this cause is the allegation in the complaint in the fifth paragraph (R. 5) that:

> "On a previous occasion in connection with the annual meeting of 1947, some of the plaintiffs had made a similar demand for a list of stockholders, which was refused."

It was pointed out to the court by counsel for the plaintiffs that on the occasion of the previous demand, he "did not have the required 2%" and that the plaintiffs "first got the 2%" when they mailed the notice for this annual meeting which was dated February 12, 1949 and they only gave "ten days' time" as they sent the letter out "about ten days before the meeting." The demand was made within *two days* thereafter. How could the plaintiffs have acted sooner? The defendant was careful not to give more than ten days' time to the stockholders to prepare for the meeting. How could any stockholder have acted earlier? The doctrine of laches or delay can only be urged by one who relied on the acts of the opposite party and who suffered by the delay. Under no stretch of the imagination may the defendant say that the acts of the plaintiffs caused it damage or injury (*Rome-Grader & Mosling Corp.* v. *Adams Mfg.*

Co., 135 F. (2) 617, 619.) Not only is the finding based on the mistaken view that the allegations in the answer are to be taken as true contrary to the rules of Federal Procedure, but it is basically unsound, as the opportunity to make the demand *first* presented itself when the plaintiffs received the notice for the annual meeting and they united for the joint demand within two days.

The right to the demand *did not exist* prior to the ten days from the date of the meeting under §35 of the Michigan Corporation Act. How could there have been *laches* when the right was exercised on the *second day* from the date of the accrual of the right to see the list?

III.

The refusal of the District Court to rule on the motion to dismiss which was argued in opposition to the restraining order warranted the maintenance of the status quo for the protection of petitioners' rights, and the Court of Appeals clearly erred in affirming the denial of the restraining order.

On the question whether the court properly refused to issue the temporary injunction it was necessary to determine whether the complaint states a claim upon which relief may be granted (*Wheeling & L. E. Ry. Co.* v. *Pittsburgh & W. V. Ry. Co.*, 33 F. (2d) 390, 393, *supra; Interstate Transit* v. *City of Detroit*, 46 F. (2) 42, 43 *supra*). The defendant handed to the court for its consideration its motion to dismiss on that ground (R. 54). Plaintiffs argued the motion and urged that it be overruled (R. 54, 76, 79-86). One of the attorneys for the defendant urged (R. 87):

> "The whole action is founded on the basis of that one fact, and his complaint doesn't state a cause of action."

This "one fact" was that the *"group"* had the required 2% of the stock, and *no individual* stockholder owned the 2%. Another attorney for the defendant urged (R. 87):

> "We have set forth as the fifth defense • • • that they have not registered stockholder owning two per cent of the stock. And, on the basis of that, your Honor will be entitled to dismiss the action on the basis of the first one stated, to dismiss the complaint because the complaint failed to state a claim against the defendant upon which relief can be granted".

At this point the court said (R. 88):

> "All right, gentlemen, the petition for a temporary restraining order is denied."

It is *evident that the court denied the temporary restraining order on the point that it was essential that there be an individual stockholder having the required* 2% and for this reason the complaint failed to state a claim upon which relief may be granted. However, in the findings of facts and conclusions of law, *the court stated* (R. 115) *that it made no decision "on this point at this time"*. It stated at the hearing (R. 88):

> "I am not taking any action on the motion to dismiss."

What then is the basis for the order?

(a) The motion to dismiss on the ground of the alleged failure to state a claim upon which relief may be granted was clearly without merit.

The motion to dismiss urged: (1) failure to state a claim upon which relief may be granted; (2) alleged

lack of diversity; (3) alleged lack of jurisdictional amount, and (4) failure of the plaintiffs to sign the complaint (R. 9).

(1) The complaint was not defective for failure to state a claim upon which relief may be granted.

The alleged failure to state a claim upon which relief may be granted raised by the motion to dismiss and also by the first defense, should have been overruled under the decisions of the Court of Appeals for the Seventh Circuit. (*Asher* v. *Ruppa,* 173 F. (2) 10; *Montgomery Ward & Co.* v. *Langer,* 168 F. 2d, 182, 185; *Dioguardi* v. *Durning,* 139 F. (2) 774, 775; *Topping* v. *Fry,* 147 F. (2), 715).

(2) The motion to dismiss because of the alleged non-existence of diversity of citizenship is clearly without basis in law.

The Complaint alleged (R. 3) that all Plaintiffs were citizens and residents of the state of Illinois, and that the Defendant corporation was organized and existing under the laws of the state of Michigan and is a resident of the state of Michigan. The allegation in the Complaint showing *complete diversity* of citizenship between the Plaintiffs on the one side, and the Defendant on the other side is all that is required under the law to confer jurisdiction on the District Court, and the motion which *admits the allegation was clearly without any foundation* (*Montgomery Ward & Co.* v. *Langer,* 168 F. (2) 182, 185). Under the Federal Rules of Civil Procedure, it is proper to state ultimate facts, and the motion to dismiss admits the ultimate facts stated in the Complaint taken in the most favorable light. (*Guth* v. *Texas Co.,* 155 F. (2) 563, 565; *Augusta Broadcasting Co.*

v. *United States,* 170 F. (2) 199, 200; *Montgomery Ward & Co.* v. *Langer, supra.*)

(3) The complaint alleged the existence of the jurisdictional amount, and the challenge of the jurisdictional amount by a motion to dismiss, which admits the allegation, or by the answer cannot be sustained.

The Complaint alleged that the claims of the Plaintiffs were in excess of $3,000 exclusive of interest and costs. The Defendant challenged this allegation by its motion to dismiss, and such a challenge may not be made by such a motion which admits the allegation.

The Complaint on its face alleged that the jurisdictional amount existed. There is nothing on its face to show the lack of jurisdictional amount, and unless it appeared from the face of the Complaint as a mathematical certainty that the jurisdictional amount was lacking, the motion to dismiss had to be overruled. (*St. Paul Indemnity Co.* v. *Cab Co.,* 303 U. S. 283, 288; *National Surety Co.* v. *City of Excelsior Springs,* 123 F. (2) 573, 576; *York* v. *Guaranty Trust Co.,* 143 F. (2) 503, 517; *Bell* v. *Preferred Life Assurance Society,* 320 U. S. 238). The entire contention is *fallacious,* as plaintiffs were *not* seeking to recover the value of their stock but to *protect a common right* and in such cases *the common right is the* determinative factor (*Johnson Ranch Royalty Co.* v. *Hickey, et al.,* 31 S. W. (2) 150, 152). In such cases the jurisdictional amount is determined by the right which is sought to be enforced or protected (*First English L. Church* v. *Evangelical L. Synod,* 135 F. (2) 701, 703; *John B. Kelly* v. *Lehigh Nav. Coal Co.,* 151 F. (2) 743, 746).

It was contended below that while the aggregate of the stock would contain the jurisdictional amount the stock may not be aggregated. The complaint must be treated in the most favorable light to plaintiffs and it must be presumed that there were some of the plaintiffs who owned sufficient shares to make up the jurisdictional amount. However, the entire contention is *fallacious*, as plaintiffs were *not* seeking to recover the value of their stock but to *protect a common right* and in such cases *the common right is the determinative factor* (*Johnson Ranch Royalty Co.* v. *Hickey et al.*, 31 S. W. (2) 150, 152). In such cases the jurisdictional amount is determined by the right which is sought to be enforced or protected. In *First English L. Church* v. *Evangelical L. Synod*, 135 F. (2) 701, the court said (p. 703):

> "In an action of this kind the value of the right which plaintiff seeks to protect is the yardstick with which to measure the question of jurisdiction."

This was also held in *John B. Kelly* v. *Lehigh Nav. Coal Co.*, 151 F. (2) 743 (p. 746):

> "It is well settled that in an action of this nature, the jurisdictional amount is to be calculated on the basis of the property right which is being injured."

The motion to dismiss and the identical point raised in the third defense (R. 11) concerning the alleged lack of the jurisdictional amount were clearly without any foundation. It was the duty of the court to strike this defense and to overrule the motion to dismiss, and it certainly had no right to consider the ground as a basis for the refusal to issue the restraining order for the purpose of maintaining the *status quo*.

(4) The motion to dismiss on the ground that the complaint is not signed by the plaintiffs is contrary to Rule 11.

Rule 11 of the Rules of Civil Procedure for the District Courts of the United States provides:

> "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name whose address shall be so stated * * * the signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."

There is no requirement under the rule for the parties themselves to either sign or verify their pleadings. The complaint was duly signed and verified by the attorney for the plaintiffs pursuant to Rule 11 (R. 8).

The defendant did *not* urge that the demand which was set out in the complaint did not contain the signatures of the plaintiffs and only urged (R. 9) that the plaintiffs did not sign the complaint, but the court stated in its findings (R. 114) that the "copy of the demand" which appears in the complaint "does not set forth the signatures of the party or parties making the demand." This finding is clearly without any basis in view of the allegation (R. 4) that "Plaintiffs made a demand in writing" as per copy of the demand, and it was not necessary to repeat that the demand was signed by the plaintiffs, as even an *oral* demand was sufficient (*Hohman* v. *Illinois-Iowa Power Co.*, 305 Ill. App. 17, 20).

IV.

Section 35 of the Michigan Corporation Code does not require that an individual stockholder own 2% of the stock, but allows the aggregation of the stock by several stockholders.

The *court* raised the point (R. 55) that the statute says "stockholder" and not "stockholders" to which counsel for plaintiffs said (R. 56) that the statute says "any stockholder", and the court stated that the "statute" says "stockholder" and not "stockholders." At the conclusion of the argument this was the main point on which the attorneys for the defendant relied (R. 87) and the court sustained them on this point (R. 88). However, in its belated finding it said that it did not rule on the point. It was its duty to rule on this point for if that was true there would be no occasion for a trial and it was the duty of the court to dispose of the issue which went to the right to maintain the action as a matter of law.

(a) Section 35 of the Michigan Corporation Code expressly authorizes the aggregation of stock by several stockholders for the required 2% of the stock to make the demand for the list of the stockholders.

Counsel for the defendant urged below that the "*entire*" corporation code must be read together "to determine the intent," and that in construing a statute the court "should apply fundamental rules of statutory construction and seek to determine the legislative intent" and "if language of statute is plain and unambiguous, no interpretation is necessary." The fallacy of their argument is that they read the statute from the *bottom*, commencing with §45, for an understanding of the in-

tent of §35 and eliminated from their consideration everything that *anteceded* these sections, and ignored their argument that in order to understand the legislative intent it is necessary to read the "entire" act.

(1) An analysis of the entire corporation act must lead to the irresistible conclusion that the aggregation of the stock to obtain the 2% requirement was proper.

Section 3 of the Michigan General Corporation Act provides that "One or more persons" may incorporate under the act. It is obvious that the words "shareholders" in §4 includes "a shareholder" in the event there was only *one* incorporator. It is also obvious that the word "incorporators" and "shareholders" as used in §5 includes an "incorporator" and "shareholder" in the event the corporation was incorporated by *one* person who is an "incorporator" and "shareholder". For the same reason the word "persons" in that section is also applicable to a "person" when he is the sole incorporator. The words "incorporator" and "incorporators" in the succeeding §7 are obviously applicable to *one* shareholder who owns all of the shares of a corporation as well as to *several* shareholders who own the shares, so that *the singular and plural are used indiscriminately in these sections.*

The use of the words "a shareholder" in §11 relating to an action between "a shareholder" and a corporation *must* be considered to include "shareholders" and so is the word "shareholder" in the second part of the section applicable to "shareholders" in relation to the defense by a corporation of the plea of *ultra vires.*

§13 concerning the removal of a director by "a majority of all of the shares" evidently includes "One or

more'' shareholders. This section specifically provides that the number of persons interested in a corporation is only applicable to corporations ''without capital stock,'' and in such a corporation the vote is by the number of persons, while in corporations which have capital stock the vote is by the amount of shares and not by the individual holders.

§16 which confers the power on ''shareholders'' to make or alter the by-laws must be considered to include ''a shareholder'' in the event of *one* person owning all of the stock. The next §17 which provides that the ''voting power'' of the different classes of shares may be restricted and §28 which provides that when *''any shareholder''* fails to pay for his shares, such shares may be sold and the holder may be sued for the unpaid balance, *must be considered to apply to ''shareholders''* who fail to pay for their shares and may be equally sued.

§29 which excepts a pledgee of shares and makes the pledgor liable as ''a shareholder'' is obviously also applicable to ''pledgees'' and to ''pledgors'' and to ''shareholders''.

The use of the words *''any shareholder''* in §30 who is enabled to sue for contribution for debts of the corporation for which he may be liable is clearly applicable to ''shareholders'' who may be compelled to pay such debts and sue for contribution from other shareholders, and it would be absurd to say that only ''a shareholder'' may sue but that ''shareholders'' may not sue. The words ''shareholder'' and ''shareholders'' are used interchangeably in §31 and clearly show that the use of the singular and plural is of no importance.

§32 limits the voting rights to ''a share'' and not to ''persons.'' It says, ''Each shareholder'' shall be en-

titled to "one vote" for "each share". The words "each shareholder" evidently include "shareholders" who may own one share and, therefore, only have one vote, and the voting rights which refer to "each shareholder" *do not mean a shareholder in the sense of an individual.* The right given in that section to "each shareholder" to vote "by proxy for each share" *clearly does not exclude the right of a group of shareholders to give a proxy* for each share which they hold collectively. The same section which uses the words "each shareholder" also uses the word "shareholders". The provision in that section for the "number of shares" to "constitute a quorum" is not limited to the number of persons, as *one* person who owns all of the shares *is included in that section.*

The singular and plural are both used invariably in §33. The word "persons" there obviously includes "person," the words "pledgor" includes "pledgors" and the words "pledgee" includes "pledgees." In §34 which commences with the words "One or more shareholders" it is provided that the subject matter shall be open to inspection of *"any shareholder"* and it is clear that the words "any shareholder" as used in that section are intended to embrace "shareholders," as it referred to "a depositor" which could be "one or more shareholders." Section 38 of the act uses the words "shareholder" for meeting purposes and provides that "a majority of the shares entitled to vote" shall constitute "a quorum." Under this section "a shareholder" having the majority of the stock would constitute a quorum to the same extent as if the majority of the stock was owned by "shareholders." §41 employs the term *"any shareholder"* who may require an inspection. A mere reading of it is sufficient to show that it was intended to apply to "share-

holders". §43 relating to an increase or decrease of capital contains the word "shareholders" and the words "holders of the majority of its shares." It would be *absurd* to say that the meaning of "holders" would exclude "a holder" of a majority of the shares. §44 uses the word "shareholder" as well as the word "shareholders" and "any shareholder", and it would be ridiculous to say that the use of the words "shareholder" and "any shareholder" was intended to exclude "shareholders."

The use of the words "person" or "persons" in §45 as having "in the aggregate 2%" tends to indicate that the legislature intended that the requirement of the 2% in section 35 to equally apply to a "person" or "persons" which is in accord with the *entire tenor* of the corporation act where both the use of *singular and plural is used indiscriminately.* This is also shown from the use of these words in the sections which follow §45.

In §47 the words "shareholder" and "any individual shareholder" evidently includes "shareholders." In ¶48 the words "any shareholder" clearly applies to "shareholders." The use of the words "any shareholder" in §54 and "shareholders" in sections 57, 60 and 61 are clearly applicable to "shareholders" in the plural. That this is the real meaning of the words employed appears from the provision in that section that during the election the list "shall be subject to the inspection of any registered shareholder or his proxy who may be present." Even our adversaries will not contend that the use of the words "any shareholder" there excludes "shareholders." The difference in the two provisions is apparent. In the first part the shareholders were required to have in the aggregate 2% of the stock, while in the latter part of the section the 2% was eliminated.

The statute being clear, no interpretation is proper or necessary (*Acme Messenger Service Co.* v. *Unemployment Compensation Commission,* 306 Mich. 704).

(2) The words "any shareholder" in Section 35 refer to the words "entitled to vote" and not to the words "holding in the aggregate".

In *Slegel* v. *Slegel,* 37 A. (2d) 57 (135 N.J. Eq. 5), the New Jersey court in defining the word "any" said (p. 58):

> "In Funk & Wagnalls new standard dictionary, among other definitions, the word 'any' is defined as 'One or some (indefinitely); one or more persons, things or portions (indefinitely) out of a number; an indefinite demonstrative."

That the word "any" includes *"one or more of a group"* was also held in *Kayser* v. *Occidental Life Insurance Co.,* 12 N. W. (2) 532, 587 (Iowa); *Employers Fidelity Assur. Corporation* v. *Forquhorson,* 188 S. W. (2) 965, 969 (Texas). In connection with this point §32 of the Michigan Corporation Code is also of importance which gives the right to each share of stock to vote, so that the business of the corporation is determined by the number of shares and not the number of stockholders. (*Simon Berg & Co.* v. *New Orleans City Railway,* 244 F. 617, 618).

The use of "any" in the plural was defined in *Harrington* v. *Interstate Businessmen's Assn.,* 210 Mich 327, and the court cited other Michigan cases on this point.

The words "any person" were defined to mean "all" persons (*Negro* v. *United States,* 276 U. S. 332, 347). The words "any extension" in the singular were defined as "extensions" in the plural (*Buchanan* v. *Blue House*

Coal Works, 119 Iowa, 115, 118). The words "any school" as used in a statute were defined to refer to "schools" in the plural (*Kirk* v. *Robeson,* 76 S. W. 183, Ky.).

V.

The findings and conclusions made after the perfection of the appeal should be wholly disregarded.

The order appealed from was entered February 23, 1949 (R. 50). A notice of appeal was filed on the same day (R. 50). Plaintiffs filed their "Designation of Contents of Record on Appeal" on March 1, 1949 (R. 101-102). The defendant filed its "Designation of Contents of Record on Appeal" on March 7, 1949 (R. 110) and on March 9, 1949 plaintiffs filed an amendment to the Designation (R. 111). *This perfected the appeal* and the making and filing of the findings and conclusions on March 16, 1949 (R. 113) was a *nullity.*

Not only did the court fail to give the plaintiffs the opportunity to object to the findings and point out the inaccuracies therein (*United States* v. *Forness,* 125 F. (2) 927, 942), but it acted without jurisdiction.

In *United States* v. *Aluminum Co. of America,* 2 F.R.D. 224, the court cited the authorities on this point and said (p. 236):

> "I think that the Supreme Court has gone further; it has specifically ruled, or at least strongly indicated that *making findings is one of the things as to which jurisdiction is terminated by an appeal being perfected. Generes* v. *Bonnemer,* 7 Wall. 564, 565, 19 L. Ed. 227; *Avendano Bros.* v. *Gay,* 8 Wall. 376, 377, 19 L. Ed. 422; *Kearney* v. *Case,* 12 Wall. 275, 280, 20 L. Ed. 395. Cf. *Gibbs* v. *Buck,* 307 U. S. 66, 78, 59 S. Ct. 725, 83 L. Ed. 1111. See also

Bethell v. *Mathews,* 13 Wall. 1, 2, 3, 20 L. Ed. 556; *Martin* v. *Drexel Ice Cream Co.,* 7 Cir., 80 F. (2d) 768, 770."

The law is well settled that the trial court loses jurisdiction with the filing of the notice of appeal. (*Walleck* v. *Huspeth,* 128 F. (2) 343, 344; *Daniels* v. *Goldberg,* 8 F.R.D. 580, 581; *Lailer & Co.* v. *Jackson,* 75 F. Supp. 827, 828; *Francke* v. *Eadie,* 373 Ill. 500, 502.

VI.

The Court abused its discretion when it denied leave to file the proposed amendment to the complaint and the affirmance of its order is in conflict with the decisions of other courts.

(a) The denial of the motion for leave to file the amendment to the complaint is subject to review.

It is well settled that the denial of a motion for leave to amend is appealable if there be an *abuse* of discretion, (*Young* v. *Garrett,* 159 F. (2d) 634, 634; *Sheridan-Wyoming Co.* v. *Krug,* 172 F. 2d, 282, 284).

(b) The denial of the motion for leave to amend was an abuse of discretion, and should have been reversed.

The defendant filed objections to the motion for leave to amend the complaint (R. 103) which the court sustained (R. 152) and denied the motion for leave to file the proposed amendment as to that part which alleged that a single holder of two per cent of the stock also made a demand (R. 89-70).

The proposed amendment (R. 89-90) which was denied *sought to eliminate the technical point* that it was necessary that each individual own the required 2% of the

stock. The original complaint alleged (R. 5) that "other stockholders having more than 2% of the outstanding capital stock have also made demands for the list of the stockholders, and the demands have been refused," under the "established policy" of the defendant to deny information to the stockholders. While it was the duty of the court to read this allegation in the most favorable light to the plaintiffs to the effect that individual stockholders having the required 2% of the stock made the demands, it was sought by the amendment (R. 89-90) *to remove any doubt and to set out the names of the stockholders and the amount of the stock which they owned.* The objection of the defendant (R. 103) that this was "a subversive attempt" on the ground that the amendment contained a demand "by one registered stockholder who claims to hold more than 2%" was obviously improper for the reason that the very purpose of an amendment is to cure defects in a pleading and to make a better case for the plaintiffs.

The fact that the persons who made these demands were not joined as parties was of no importance, as they were *not indispensable* parties and the allegation was merely to show the established policy of the defendant, and the 2% requirement was only necessary for the demand and was not a pre-requisite to the right to maintain the action (*Spelman* v. *Addison,* 300 Mich. 690, 697).

Under the liberal construction of Rule 15 it was the duty of the court to permit the amendment to be filed (*Tahir Erk* v. *Glen L. Martin Co., supra,* 116 F. (2) 865, 871; *Keene Lumber Co.* v. *Leventhal,* 165 F. (2) 815, 819; *Forman* v. *Messirow,* 167 F. (2) 711, 714). The assertion of the "subversive attempt" is *refuted* by the allegation in the Complaint (R. 5). The proposed amend-

ment merely supplied the names of the stockholders and the amount of the stock which they hold.

The second reason in support of the objections to the filing of the amendment is (R. 103) on the alleged ground that it is "a subversive attempt to confer jurisdiction" without making the residents of Michigan parties-plaintiffs which would have ousted the court of jurisdiction on the ground of the lack of diversity. The point is devoid of merit for the reason that even if this were true the Plaintiffs had the right not to join the Michigan stockholders because such stockholders were *not indispensable parties,* and the Plaintiffs would have had the right to eliminate them as parties even if they had joined them, in order to cure a jurisdictional defect (*Alderman* v. *Elgin,* 125 F. (2) 971, 973; *Southern California Freight Lines* v. *Davis,* 167 F. (2) 714; *London* v. *Kingsley,* 81 F. Supp. 83, 84; *Kentucky Natural Gas. Co.* v. *Duggin,* 165 F. (2) 1011, 1015).

The third ground in support of the objections (R. 103) that the amendment was not prepared in good faith, requires no discussion as the defendant was in no position to challenge the good faith by objections to the filing of an amendment.

Whether or not the effect of the amendment would be to *prejudice* the "legal" rights of the defendant as urged in the fourth ground in the objections (R. 104) is of little importance, as the amendment was sought to be filed *before* trial, and whether or not the legal rights of the defendants will be affected is to be determined from the evidence in the case. *A litigant has a right to prejudice the legal rights of his adversaries* if, as a matter of law, such legal right would be affected.

The amendment was permissible under the liberal construction of Rule 15. (*McDowall* v. *Orrhelt & Blanket Co.*, 146 F. (2) 136; *Maryland Casualty Co.* v. *Rikenbaker*, 146 F. (2) 751). Even where a Complaint fails to state a cause of action it is the duty of the court to permit an amendment to *cure* any of the defects. (*Tahir Erk* v. *Glen L. Martin Co.*, 116 F. (2) 865, 871; *Champ* v. *Atkin*, 128 F. (2) 601; 603; *Forman* v. *Messirow*, 167 F. (2) 711, 714).

Under Rule 15 an amendment is permissible to enable the plaintiff to make a better case. "Pleadings" are not an "end" in themselves but are "means" in the proper presentation of a case, and they are not "to deter" but to "assist" in the disposition of litigation on the merits. (*Noty* v. *Grosselli Chemical Co.*, 303 U. S. 197, 200). The affirmance of the orders is in conflict with these decisions.

VII.

The failure of the Court to overrule defendant's motion to dismiss and the several defenses and to determine the legal questions in advance of the trial, was an abuse of its discretionary power, and the Court of Appeals should have reversed its orders.

Plaintiffs moved under Rule 12(d) for a disposition of the legal questions involved in the several defenses and in the motion to dismiss, and after hearing argument the court refused to pass on the legal questions until trial. Petitioners contend that the failure to rule was an *abuse* of discretion and is not within the spirit of this Rule.

(a) The motion to strike the defenses and to overrule the motion to dismiss involved legal questions which should have been passed on by the court after argument.

Plaintiffs moved pursuant to Rule 12(d) to overrule the motion to dismiss and to strike several of the defenses (R. 112). While the court had the right to order that the "hearing" thereon be postponed to the trial it had no right to postpone its ruling *after it heard* the argument, and it was its duty to pass on the legal questions as a guide to the parties in connection with the trial of the case. The court heard argument on the motion to dismiss on February 23, 1949 (R. 79-86). Pursuant to its order briefs were filed by the attorneys, and thereafter it heard further argument and continued the further hearing to March 24, 1949 (R. 3). Instead of ruling on the legal questions it followed the suggestion of counsel for the defendant to *delay* the determination of these issues until the hearing on the merits.

The question involved was whether under the Michigan statute a group of stockholders who aggregated their stock for the required 2% had the right to maintain the action. The determination of this issue could not be affected by the evidence, as *it involved a legal construction.* The issue whether or not the plaintiffs had the right to aggregate their stock for the jurisdictional amount was also a *legal* question which should have been decided regardless of any evidence that may be offered at the hearing. Only in cases where it is "difficult" to decide the issues *without evidence* may a court delay its ruling under rule 12(d). (*Scott* v. *Penn. R. Co.*, 12 F.R.S. 12d, 2, Feb. 1, 1949; Moore's Fed Prac. (2) Vol. 2, pp. 2274-2275.)

We have shown above that the motion to dismiss was not well founded as a matter of law, and that the several defenses were *legally unsound*, and it was, therefore, the duty of the court to pass on the legal questions without delay.

Conclusion.

We have shown above that there is involved in this Petition the construction of rules 8(d), 11 and 12 of the Federal Rules of Civil Procedure, and that the decision of the Court of Appeals for the Sixth Circuit is not in harmony with the decisions of the other courts and is not within the spirit of the rules. Therefore, this court should exercise its discretion and allow the writ.

Respectfully submitted,

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